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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 ZACHARY NICOLAS ANGEL,

12 Plaintiff,

13 v.

14 CALIFORNIA CORRECTIONAL
15 HEALTH CARE SERVICES, *et al.*,

16 Defendants.

Case No. 1:20-cv-01713-BAM (PC)

ORDER DIRECTING CLERK OF COURT TO
RANDOMLY ASSIGN DISTRICT JUDGE TO
ACTION

FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM, FAILURE
TO OBEY COURT ORDER, AND FAILURE
TO PROSECUTE

(ECF No. 9)

FOURTEEN (14) DAY DEADLINE

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20 **I. Background**

21 Plaintiff Zachary Nicolas Angel (“Plaintiff”) is a state prisoner proceeding *pro se* and *in*
22 *forma pauperis* in this civil rights action under 42 U.S.C. § 1983. This matter was referred to a
23 United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

24 On March 24, 2021, the Court issued a screening order granting Plaintiff leave to file a
25 first amended complaint or a notice of voluntary dismissal within thirty (30) days. (ECF No. 9.)
26 The Court expressly warned Plaintiff that the failure to comply with the Court’s order would
27 result in a recommendation for dismissal of this action, with prejudice, for failure to obey a court
28 order and for failure to state a claim. (*Id.* at 7.) The deadline has expired, and Plaintiff has failed

1 to file an amended complaint or otherwise communicate with the Court.

2 **II. Failure to State a Claim**

3 **A. Screening Requirement**

4 The Court is required to screen complaints brought by prisoners seeking relief against a
5 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). Plaintiff's complaint, or any portion thereof, is subject to dismissal if it is frivolous
7 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
8 relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b).

9 A complaint must contain "a short and plain statement of the claim showing that the
10 pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
11 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
13 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff's allegations are taken as
14 true, courts "are not required to indulge unwarranted inferences." *Doe I v. Wal-Mart Stores, Inc.*,
15 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

16 To survive screening, Plaintiff's claims must be facially plausible, which requires
17 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
18 for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss v. U.S. Secret*
19 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully
20 is not sufficient, and mere consistency with liability falls short of satisfying the plausibility
21 standard. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss*, 572 F.3d at 969.

22 **B. Plaintiff's Allegations**

23 Plaintiff is currently housed at California State Prison in Corcoran, California where the
24 events alleged in the complaint occurred. Plaintiff names the following defendants: (1) California
25 Correctional Health Care Services, (2) California Department of Corrections and Rehabilitation
26 ("CDCR"), and (3) Nancy Ordonez, medical assistant.

27 Plaintiff alleges medical deliberate indifference for not disclosing possible side effects of
28 medication. Plaintiff alleges:

1 On 10/21/20, Nancy Ordonez, Defendant 3, had a pneumonia vaccine that she said
2 I needed to receive, and that it would be good for me. She did not tell me that
3 there would be any side effects, nor did she tell me that this vaccine was for people
4 60 years of age or older. I'm only 28. I also found out later in my medical
5 paperwork that this was going to be for my Hepatitis C, which she did not tell me
6 either. By failing to tell me the true purpose of this vaccine and its side effects, I
7 had to go through extreme pain and suffered for several days in which my arm
8 swoll up and broke out in a red rash due to an allergic reaction. Defendants 1 and
9 2, are also responsible, because Nancy Ordonez works for them and they should
10 have trained her to properly inform me of the possible side effects and reaction to
11 the vaccine. My pain and suffering could have been avoided if these mistakes
12 weren't made.

13 (ECF No. 1, p. 3 (unedited text).)

14 Plaintiff alleges his arm was sore and swollen for five days, with the rash on his entire
15 arm. Plaintiff seeks compensation of \$50,000.

16 **C. Discussion**

17 Plaintiff's complaint fails to state a cognizable claim under 42 U.S.C. § 1983.

18 **1. Eleventh Amendment Immunity**

19 "The Eleventh Amendment bars suits for money damages in federal court against a state,
20 its agencies, and state officials in their official capacities." *Aholelei v. Dept. of Public Safety*, 488
21 F.3d 1144, 1147 (9th Cir. 2007). However, the Eleventh Amendment does not bar suits seeking
22 damages against state officials in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 30–31
23 (1991); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003). Additionally, the Eleventh
24 Amendment does not bar suits for prospective declaratory or injunctive relief against state
25 officials in their official capacities. *Ex Parte Young*, 209 U.S. 123, 155–56 (1908); *Will v.*
26 *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989); *Kentucky v. Graham*, 473 U.S. 159,
27 167 n.14 (1985); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).

28 "California prisons are entitled to Eleventh Amendment immunity." *Lopez v. Wasco State*
Prison, 2008 WL 5381696, at *4 (E.D. Cal. Dec. 22, 2008) (citing *Keel v. California Dep't of*
Corr. & Rehab., 2006 WL 1523121, at *2 (E.D. Cal. May 30, 2006), report and recommendation
adopted sub nom. *Keel v. CDCR*, 2006 WL 2501527 (E.D. Cal. Aug. 28, 2006)). The State and
arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not

1 subject to suit under § 1983 in either federal court or state court.” *Howlett v. Rose*, 496 U.S. 356,
2 365 (1990).

3 Plaintiff is only seeking money damages. Since the CDCR, the prison, and the
4 departments within the prison are arms of the State, they are immune from suit, and plaintiff fails
5 to state any claims against them.

6 **2. Deliberate Indifference to Serious Medical Needs**

7 While the Eighth Amendment of the United States Constitution entitles Plaintiff to
8 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate
9 indifference to an inmate’s serious medical needs. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th
10 Cir. 2012), overruled in part on other grounds, *Peralta v. Dillard*, 744 F.3d 1076, 1082-83 (9th
11 Cir. 2014); *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012); *Jett v. Penner*, 439 F.3d
12 1091, 1096 (9th Cir. 2006). Plaintiff “must show (1) a serious medical need by demonstrating
13 that failure to treat [his] condition could result in further significant injury or the unnecessary and
14 wanton infliction of pain,” and (2) that “the defendant’s response to the need was deliberately
15 indifferent.” *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at 1096). Deliberate indifference is
16 shown by “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need,
17 and (b) harm caused by the indifference.” *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at
18 1096). The requisite state of mind is one of subjective recklessness, which entails more than
19 ordinary lack of due care. *Snow*, 681 F.3d at 985 (citation and quotation marks omitted); *Wilhelm*,
20 680 F.3d at 1122.

21 A serious medical need exists if the failure to treat the condition could result in further
22 significant injury or the unnecessary and wanton infliction of pain. *Jett v. Penner*, 439 F.3d 1091,
23 1096 (9th Cir. 2006). To act with deliberate indifference, a prison official must both be aware of
24 facts from which the inference could be drawn that a substantial risk of serious harm exists, and
25 he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a
26 defendant is liable if he knows that plaintiff faces “a substantial risk of serious harm and
27 disregards that risk by failing to take reasonable measures to abate it.” *Id.* at 847. “It is enough
28 that the official acted or failed to act despite his knowledge of a substantial risk of harm.” *Id.* at

1 842.

2 In applying this standard, the Ninth Circuit has held that before it can be said that a
3 prisoner's civil rights have been abridged, "the indifference to his medical needs must be
4 substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this
5 cause of action." *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle v*
6 *Gamble*, 429 U.S. 97, 105–06 (1976)). "[A] complaint that a physician has been negligent in
7 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
8 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
9 merely because the victim is a prisoner." *Estelle*, 429 U.S. at 106; *see also Anderson v. County of*
10 *Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995). Even gross negligence is insufficient to establish
11 deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334
12 (9th Cir. 1990). Additionally, a prisoner's mere disagreement with diagnosis or treatment does
13 not support a claim of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

14 A difference of opinion between an inmate and prison medical personnel—or between
15 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to
16 establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989);
17 *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir 2004). Additionally, "a complaint that a
18 physician has been negligent in diagnosing or treating a medical condition does not state a valid
19 claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not
20 become a constitutional violation merely because the victim is a prisoner." *Estelle*, 429 U.S. at
21 106.

22 Plaintiff's allegations fail to show an Eighth Amendment violation. At most Plaintiff's
23 allegation that he should not have received vaccine shows a misdiagnosis or disagreement with
24 the diagnosis which is not sufficient to state a cognizable claim. *See Wilhelm v. Rotman*, 680
25 F.3d 1113, 1123 (9th Cir. 2012) (a misdiagnosis does not state a cognizable claim for deliberate
26 indifference.); *Sanchez v. Vild*, 891 F.2d at 242 (an inmate's disagreement with diagnosis or
27 treatment does not support a claim of deliberate indifference). Plaintiff's allegation that he
28 suffered side effects is also insufficient to state a claim. *Fratus v. Dayson*, No. 2:20-CV-0354 DB

1 P, 2021 WL 598650, at *5 (E.D. Cal. Feb. 16, 2021) (fail to state a claim for injection given
2 against his will, was not the correct medication to treat his condition, and caused him to suffer
3 serious side effects.) *See Franklin v. State of Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981)
4 (holding, in part, that improper medical treatment that caused “soreness and swelling” merely
5 rose to the level of negligence and not deliberate indifference to a serious medical problem under
6 the Eighth Amendment). Here, Plaintiff has merely alleged negligence at best by Defendant
7 Ordonez. It appears that the vaccine was given to treat Plaintiff’s Hepatitis. Plaintiff must plead
8 more than a mere disagreement with the chosen course of medical treatment. Plaintiff must
9 sufficiently allege facts to support that Defendant Ordonez knew of and disregarded a “substantial
10 risk of serious harm” in giving Plaintiff the vaccine.

11 **3. State Law Claims**

12 Plaintiff may be attempting to allege negligence.

13 Under 28 U.S.C. § 1367(a), in any civil action in which the district court has original
14 jurisdiction, the “district courts shall have supplemental jurisdiction over all other claims that are
15 so related to claims in the action within such original jurisdiction that they form part of the same
16 case or controversy under Article III of the United States Constitution,” except as provided in
17 subsections (b) and (c). The Supreme Court has stated that “if the federal claims are dismissed
18 before trial, . . . the state claims should be dismissed as well.” *United Mine Workers of Am. v.*
19 *Gibbs*, 383 U.S. 715, 726 (1966).

20 Although the Court may exercise supplemental jurisdiction over state law claims, Plaintiff
21 must first have a cognizable claim for relief under federal law. 28 U.S.C. § 1367.

22 Further, the Government Claims Act requires exhaustion of Plaintiff’s state law tort claims
23 with the California Victim Compensation and Government Claims Board, and Plaintiff is required
24 to specifically allege compliance in his complaint. *Shirk v. Vista Unified Sch. Dist.*, 42 Cal. 4th
25 201, 208–09 (Cal. 2007); *State v. Superior Court of Kings Cty. (Bodde)*, 32 Cal. 4th 1234, 1239
26 (Cal. 2004); *Mabe v. San Bernardino Cty. Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1111 (9th
27 Cir. 2001); *Mangold v. California Pub. Utils. Comm’n*, 67 F.3d 1470, 1477 (9th Cir. 1995);
28 *Karim–Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 627 (9th Cir. 1988). Plaintiff has not

1 alleged he has complied with the Government Claims Act for his state law claim.

2 **III. Failure to Prosecute and Failure to Obey a Court Order**

3 **A. Legal Standard**

4 Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with
5 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
6 within the inherent power of the Court.” District courts have the inherent power to control their
7 dockets and “[i]n the exercise of that power they may impose sanctions including, where
8 appropriate, . . . dismissal.” *Thompson v. Hous. Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A
9 court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,
10 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*, 46
11 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*,
12 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
13 amendment of complaint); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130–33 (9th Cir. 1987)
14 (dismissal for failure to comply with court order).

15 In determining whether to dismiss an action, the Court must consider several factors:
16 (1) the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
17 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
18 cases on their merits; and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779
19 F.2d 1421, 1423 (9th Cir. 1986); *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988).

20 **B. Discussion**

21 Here, Plaintiff’s first amended complaint is overdue, and he has failed to comply with the
22 Court’s orders. The Court cannot effectively manage its docket if Plaintiff ceases litigating his
23 case. Thus, the Court finds that both the first and second factors weigh in favor of dismissal.

24 The third factor, risk of prejudice to defendant, also weighs in favor of dismissal, since a
25 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
26 *Anderson v. Air W.*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs against
27 dismissal because public policy favors disposition on the merits. *Pagtalunan v. Galaza*, 291 F.3d
28 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose

1 responsibility it is to move a case toward disposition on the merits but whose conduct impedes
2 progress in that direction,” which is the case here. *In re Phenylpropanolamine (PPA) Products*
3 *Liability Litigation*, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

4 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
5 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;
6 *Malone*, 833 at 132–33; *Henderson*, 779 F.2d at 1424. The Court’s March 24, 2021 screening
7 order expressly warned Plaintiff that his failure to file an amended complaint would result in a
8 recommendation of dismissal of this action, with prejudice, for failure to obey a court order and
9 for failure to state a claim. (ECF No. 9, p. 7.) Thus, Plaintiff had adequate warning that dismissal
10 could result from his noncompliance.

11 Additionally, at this stage in the proceedings there is little available to the Court that
12 would constitute a satisfactory lesser sanction while protecting the Court from further
13 unnecessary expenditure of its scarce resources. Plaintiff is proceeding *in forma pauperis* in this
14 action, making monetary sanctions of little use, and the preclusion of evidence or witnesses is
15 likely to have no effect given that Plaintiff has ceased litigating his case.

16 **IV. Conclusion and Recommendation**

17 Accordingly, the Court HEREBY ORDERS the Clerk of the Court to randomly assign a
18 district judge to this action.

19 Further, the Court finds that dismissal is the appropriate sanction and HEREBY
20 RECOMMENDS that this action be dismissed, with prejudice, for failure to state a claim
21 pursuant to 28 U.S.C. § 1915A, for failure to obey a Court order, and for Plaintiff’s failure to
22 prosecute this action.

23 These Findings and Recommendation will be submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
25 **(14) days** after being served with these Findings and Recommendation, Plaintiff may file written
26 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
27 Findings and Recommendation.” Plaintiff is advised that failure to file objections within the
28 specified time may result in the waiver of the “right to challenge the magistrate’s factual

findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: May 10, 2021

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE